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Nos. 85-1036 and 85-1037

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,
Petitioners,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

NEW JERSEY PUBLIC INTEREST RESEARCH GROUP INC.,
Petitioner,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a state university constitutionally compel its students to pay a mandatory fee, each semester, to an independent, outside organization, which generates and actively promotes political and ideological positions, even though the fee may eventually be refunded?

2. If it is determined that a state university may not constitutionally compel its students to pay a mandatory fee, each semester, to an independent, outside organization, which generates and actively promotes political and ideological positions, did the appellate court err in enjoining the continued collection of the mandatory fee?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents herein respectfully request that this Court deny the petitions for *writs of certiorari*, seeking review of the Third Circuit's opinion in this case. That opinion is reported at 772 F.2d 1060.

STATEMENT OF THE CASE

In 1979, three students at the Rutgers Camden College of Arts and Sciences filed suit against the University

contending that they could not constitutionally be required to support an independent, political and ideological group as a precondition of their enrollment at the state university.[1] Specifically, they objected to being forced to pay a special fee, which was then transferred to the New Jersey Public Interest Research Group (hereinafter referred to as "PIRG"). Although during the course of the litigation the lawsuit has been expanded, and now includes additional students as well as the entire Rutgers' system, their challenge remains the same.

Since 1972, Rutgers, the State University of New Jersey (hereinafter referred to as "Rutgers"), has compelled its students to pay a separate PIRG fee, each semester, which has risen from $1.50 to $3.50 per semester. 80a.[2] Between 1972 and 1984, the total amount collected by Rutgers and transferred to PIRG was over $800,000. *Id.* Payment of the PIRG fee is mandatory, but may be eventually refunded upon the written request of an individual student.

PIRG is a non-partisan, non-profit New Jersey corporation completely independent of Rutgers. 77a. It was and remains ineligible for funding from Rutgers' general student activity fee because of its independence. *Id.* PIRG is a state-wide organization, and its membership is composed of students at Rutgers, students from other colleges and universities, as well as other interested citizens.

PIRG is an organization created to research and lobby for social change. 77a.[3] New Jersey PIRG "spon-

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1. The parties stipulated, for the purposes of this action only, that action taken by Rutgers is state action. 76a.

2. Citations to the Joint Appendix to petitioners' petitions will be cited in the form "_____a."

3. PIRGs were initially welcomed by university adminstrators among other reasons because they were a vehicle for students to develop and further their political and social beliefs in a socially acceptable manner. PIRGs developed nationally shortly after the height of student unrest stemming from American involvement in

sors debates, lectures and public fora on matters of public interest and concern. The subjects of these functions have included such issues as education and tuition policy, decision making in the energy field, and the Equal Rights Amendment." 86a. It is extremely involved in issues affecting the environment and consumer protection. 86a-87a. In addition, "other major areas of PIRG's work include energy conservation, tuition policy and financial aid, tenant's rights, and women's rights." 87a.

The district court found that several of the defendants' witnesses at trial "acknowledged that PIRG takes positions on issues of social importance and works to advance those positions." 94a. The district court further found that:

> PIRG, through its board of directors, has taken positions on issues of social importance—such as the development and enforcement of environmental protection laws—and has worked to advance its positions, generally through the dissemination of information and through advocacy in the university community and the general public, and before appropriate governmental bodies . . . . 100a.

With respect to the unrebutted testimony of the students' expert witnesses regarding PIRG's primary function and purpose, the district court made the following findings:

> Stanley Rothman is a Professor of Government at Smith College and an expert in political science. He believes that PIRG consistently represents and adheres to a liberal ideology and view of American society as covertly oppressive and that PIRG takes consistently predictable positions on issues about which there exists public controversy. He believes

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the Vietnam War. The proposed structure of PIRGs was suggested by Ralph Nader and Donald Ross in their book 'Action For a Change,' published in 1972. 78a.

that people join PIRG because they have certain ideological views that are reinforced by membership in PIRG and that universities should be places where students are somewhat removed from ideologies and as fair and dispassionate as possible.

Ellis Katz is an Associate Professor of Political Science at Temple University and an expert in political science. He testified that PIRG's essential purpose is to pursue change in the political process and that all of PIRG's activities, including its research and publications, are merely incidental to that purpose. He acknowledged on cross-examination that he could not quantify PIRG's political and non-political activities and that many of PIRG's activities, including its consumer guides, were non-ideological. 96a.

At the conclusion of the ten-day bench trial the district court found in favor of the defendants, holding that the students had "failed to make out a *prima facie* case that their constitutional rights [had] been violated." 104a. The district court's decision was premised upon its view that students at Rutgers who participated in PIRG learned from their experience. It accepted the University's judgment for this position and adopted it as its own. 103a-104a. Educational benefit was found to be dispositive. Thus, PIRG's political and ideological activities were deemed acceptable, because they provided students with the opportunity to learn. The district court made no findings regarding PIRG's primary purpose or essential function.[4] Having found that PIRG's activities

4. With respect to the testimony of the students' expert witnesses, the district court determined that "[T]o the extent that plaintiffs' experts disagree with defendants' experts about the nature of PIRG and its contributions to the university community, the court finds that there exists on these issues some difference of opinion in the academic community." 102a.

enhanced the educational opportunities at Rutgers, 109a, it upheld the mandatory exaction of the PIRG fee.

The students appealed the district court's ruling to the United States Court of Appeals for the Third Circuit, which, by a 2-to-1 decision with Judge Adams dissenting, reversed the lower court's ruling and enjoined the continued exaction of the PIRG fee.[5] 1a-18a.

The circuit court framed the issue before it as "whether a state university may compel students to pay a specified sum, albeit refundable, to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support." 11a.

The appellate court then reviewed the district court's findings with respect to PIRG's structure and activities, as well as the educational evaulations of those activities offered by the defendants and adopted by the district court. 12a. It determined that PIRG functions primarily as a political/ideological group, stating:

> PIRG's efforts are primarily devoted to changing conditions outside the University. For example, its interest in environmental and energy concerns focuses on state-wide or national issues. Similar in scope is its commitment to enactment of an equal rights amendment, reform of tenants rights, and a nuclear weapons freeze. While such matters may affect the general public, those causes are not particularly germane to students of the University *qua* students. 12a.
>
> . . . .
>
> . . . The district court in reciting PIRG's history stated, 'Under the students' proposal, PIRG was to be a non-partisan, non-profit corporation which

5. Respondents dispute PIRG's representation that the court of appeals implicity affirmed the district court's denial of class certification. Pp 7. To the contrary, the court of appeals never ruled upon this issue.

> would research and lobby for social change.' [citation omitted]. Those functions have continued to be PIRG's *raison d'etre* as a review of its programs and activities confirms. 13a.

Although the district court had acknowledged PIRG's political and ideological activities, it ruled in favor of the defendants because it found that participation in these activities by students at Rutgers was educational. Thus, the students' first amendment rights were not violated by the compelled exaction of the PIRG fee, because all of PIRG's activities, including the political and ideological ones, were deemed by the district court to be educational. The circuit court, however, refused to allow educational benefit to immunize what it found PIRG's essential function and purpose to be—the pursuit of defined social and ideological change. It stated:

> Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only 'incidental'—arising from or accompanying the principal objectives—and subordinate to the group's function of promoting its political and ideological aims. 13a.
>
> . . . .
>
> We conclude that defendants did not overcome the caution we raised in our first opinion—the educational component cannot obscure the underlying substance of the plaintiff's complaint that they were compelled to finance a political entity whose function is to attain certain fixed ideological objectives. 686 F.2d at 166. 14a.

Having determined that educational benefit could not transform PIRG's primary function and purpose into

constitutionally permissible activity, the circuit court addressed the question of whether Rutgers had demonstrated a sufficiently compelling state interest which would nevertheless permit it to continue to exact the PIRG fee, thus justifying the violation of the students' first amendment rights.

The circuit court again distinguished PIRG, an independent, state-wide organization, from other student groups on Rutgers' campuses. It also noted that the availability of the funding policy to other entities did not cure the underlying constitutional infringement—students would still be forced to contribute to political and ideological entities with which they disagreed or would voluntarily choose not to support. 17a. Finally, it ruled that Rutgers had not demonstrated any compelling state interest that would permit the continued abridgement of the students' first amendment rights. *Id.*

Accordingly, the circuit court held that:

> [T]he district court erred in concluding that plaintiffs had failed to make out a *prima facie* case. They presented credible evidence that PIRG was an outside independent, ideologically-oriented organization whose activities they opposed but were nevertheless compelled to support directly through a mandatory fee. Those facts were not disputed, and by presenting that evidence plaintiffs established a *prima facie* case.
>
> The University relied on the deference to be given its judgment as to PIRG's educational value. But as has been discussed, that judgment was not supported by evidence of an educational component other than that incidental to, and inherent in, the ideological activities. Moreover, the district court did not make any findings to demonstrate a compelling state interest that would justify utilization of PIRG as a vehicle for the incidental educational benefits in

preference to a campus, or another outside organization, which did not require the compelled support of plaintiffs. 18a.

Judge Adams, in a lengthy opinion, dissented and would have affirmed the district court's ruling. 19a-40a. Defendants' Petition for Rehearing was denied. 69a-70a. Defendants now petition this Court for *writs* of *certiorari.*

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION OF THE COURT BELOW RESPECTS AND PRESERVES THE FUNDAMENTAL FIRST AMENDMENT FREEDOM OF ALL CITIZENS TO VOLUNTARILY SUPPORT, OPPOSE OR REMAIN UNINVOLVED WITH RESPECT TO ANOTHER'S IDEOLOGY.

The respondents herein challenge the authority of Rutgers to compel its students to pay a mandatory, distinct fee, each semester, which is then transmitted to PIRG. Essentially, they contend that Rutgers, an instrumentality of the state, cannot constitutionally compel them to support an independent, political and ideological organization as a precondition of their enrollment at the state university.

I. This case involves only the state required contribution to an independent, political and ideological organization.

With respect to the exaction and subsequent transmission of the PIRG fee by Rutgers, the precise issue before this Court is "whether a state university may compel students to pay a specified sum, albeit refundable, to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support." 11a.

The district court found that students at Rutgers were required to pay the PIRG fee; that PIRG was a private corporation independent of the University; and that PIRG generated political and ideological positions and worked actively to promote them. Although the district court ultimately ruled that the University's judgment as to the educational value of participation in PIRG validated, in constitutional terms, these activities, its aforesaid findings remain applicable. Thus, the dispute herein is much narrower than that proposed by the petitioners.

In this regard, the circuit court explicitly identified the issues which were not before it, stating:

> This case does not address the problem presented by a state university's allocation of a mandatory nonrefundable student activity fee. We are not concerned here with the question whether an organization with PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views.
>
> In short, we do not enter the controversy on whether a given campus organization may participate in the general activities fee despite the objections of some who are required to contribute to that fund. *See, e.g., Kania v. Fordham,* 702 F.2d 475 (4th Cir. 1983); *Maryland Public Interest Research Group v. Elkins,* 565 F.2d 864 (4th Cir. 1977). *See also* Note, *"Fee Speech:" First Amendment Limitations on Student Fee Expenditures,* 20 Cal. W.L. Rev. 279 (1984).
>
> And, although we are reluctant to belabor the obvious, it apparenly must be made absolutely clear that in no way does this case present the issue of whether PIRG or any other organization may be restricted in the expression of its views on campus or

> elsewhere. Nor does this case in any way question PIRG's right to finance its operations by voluntary contributions from those who agree with its objectives. 10a.

Accordingly, despite the petitioners' assertions to the contrary, the analysis of this controversy must remain focused upon the element of involuntary support for a particular ideology inherent in the PIRG fee.

II. The decision below neither restricts Rutgers' academic freedom nor prohibits PIRG from generating and advancing the political and ideological positions of its choice. PIRG remains free to generate its support through voluntary means.

Petitioners contend that the court's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); 1a-40a (hereinafter referred to as *"Galda II"*), will wreak havoc upon state universities across the nation, They suggest that the academic freedom enjoyed by Rutgers and other state universities will be severely limited. They submit that courts and universities will have to be "content" sensitive in carrying out their respective responsibilities. Finally, they assert that the constitutional rights of the majority will be abridged. Rp 10-17; Pp 10-16.[6] However, an examination of the actual holding of *Galda II* reveals that petitioners' concerns are unfounded.

First, should Rutgers so desire, it will be and always has been free to encourage its students to become involved with PIRG and participate in PIRG's activities. Second, PIRG will be free to generate positions on political and ideological issues and work actively to promote them. Third, PIRG will have unlimited access to the entire Rutgers' community; it may remain on the various

6. Citations to Rutgers' petition will be cited in the form "Rp_____."; citations to PIRG's petition will be cited in the form "Pp_____."

campuses; and it will have every opportunity to seek support through truly voluntary means. Finally, any student at Rutgers desiring to participate in PIRG's activities will be able to do so, and will be and always has been free to voluntarily support PIRG, financially or otherwise, at whatever level he or she desires. The freedoms set forth above have never been the subject of the students' constitutional challenge.

GALDA II only prohibits the requirement that every student at Rutgers support PIRG in exchange for an education at the state university. Consequently, Rutgers remains unaffected, except for the fact that it will no longer be able to compel all of its students to support an independent, political and ideological entity. Judge Adams, writing for the majority in *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1981); 45a-65a (hereinafter referred to as "*Galda I*"), recognized this limitation on a state university's authority, stating:

> To be sure, one by-product of PIRG is the education of its participants. But that end might also have been secured if the student-participants had worked for a political action group totally unconnected with [Rutgers], and yet it could not be seriously contended that student fees could be funneled to such a group. 686 F.2d at 166; 58a.

Since Rutgers is free in all other respects to continue its involvement with PIRG, Rutgers has only lost that which it never constitutionally possessed.

Moreover, the fact that *The Daily Targum*, the student newspaper at Rutgers, is now funded in the same manner as PIRG does not compel a contrary conclusion. PIRG and *The Daily Targum* are inherently different. PIRG is an entity independent of Rutgers. It is no different than the Americans for Democratic Action or the Moral Majority. Conversely, *The Daily Targum* is the

campus newspaper. Because Rutgers now chooses to fund its student newspaper differently in no way legitimizes the mandatory contributions to PIRG.[7]

Although not raised by the petitioners, the real effect of *Galda II* is more pronounced upon PIRG. The PIRG fee process at Rutgers required an up-front contribution of $3.50 from every student, each semester. Thereafter, a student could obtain a refund provided that he or she identified themselves and complied with a set of precise directives. Logic dictates that three classes of individuals would emerge. First, those students who were in agreement with the goals and objectives of PIRG and wished to contribute to their furtherance. Second, those students who actively opposed the positions of PIRG and who were willing to make known their dissent by complying with the refund procedure. Finally, and in all probability the largest of the three, those students who would not have voluntarily contributed to PIRG, but who were unwilling to make the substantial efforts necessary, on eight occasions, to secure a refund. In *Galda I*, Judge Adams acknowledged the involuntary nature of a large portion of this type of support when he stated:

> The dissenters object to the *entire* fee; and under the University's refund system, the entire fee would have been returned to the dissenter upon request. We have been presented with no convincing

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7. Rutgers did not elect to fund *The Daily Targum*, one of the nation's oldest continuously operating student newspapers, through the Special Student Funding Policy until 1980. Prior to that time, students at Rutgers were nevertheless required to subsidize their campus newspaper. However, mandatory student support of a campus newspaper has been upheld because of the important state interest which a student newspaper furthers. *See, e.g., Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983). In the instant matter, PIRG does not enjoy similar status. Thus, while Rutgers may be free to compel student funding for the campus newspaper, respondents submit that similar funding for an independent, political and ideological action group is proscribed by the first amendment.

> reason—besides the obvious motive to procure additional funding from those students who do not wish to join PIRG but who are indifferent enough to forego seeking a refund—why PIRG could not obtain its financial support through purely voluntary contributions. 686 F.2d at 169 n.17; 64a. (emphasis in original).

Thus, PIRG will lose the advantage of generating its support through the university's mandatory billing process. Moreover, it will no longer receive the benefit of contributions secured from those students unwilling to avail themselves of the refund procedure. However, while these sums may be substantial, respondents contend that their loss will not justify or permit the perpetuation of unconstitutional exactions from all students at Rutgers.

III. The decision below is consistent with this Court's rulings in Widmar v. Vincent, 454 U.S. 263 (1981), and Healy v. James, 408 U.S. 169 (1972). Voluntary student participation in and support of PIRG remains unchanged.

Petitioners attempt to raise the spectre of irreconcilable conflicts between the decision in *Galda II* and this Court's opinions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Healy v. James*, 408 U.S. 169 (1972). However, *Galda II* is not an "access" case. Moreover, when the actual conduct at issue and the precise holding of *Galda II* are examined, it becomes apparent that all three cases are consistent.

In *Widmar v. Vincent*, this Court held that where a university generally made its facilities available to all student groups it could not exclude certain student organizations based upon their religious content. 454 U.S. at 277. Similarly, in *Healy v. James*, this Court ruled that a university could not refuse recognition to a student organization soley on the basis of the group's political philosophy. 408 U.S. at 187, 188. Neither case involved

compelled, separate financial contributions to the organizations at issue by the entire student body, nor did either case contemplate that all students would be required to worship with Cornerstone or become members of the Students for a Democratic Society.

Rutgers has decided to encorage its students to become involved with and participate in PIRG. Thus, it has allowed PIRG access to the Rutgers' campuses. Provided that Rutgers does not preclude this access to other independent, political and ideological groups because of their ideological content, it is free to maintain this situation. *Widmar v. Vincent*, 454 U.S. 263; *Healy v. James*, 408 U.S. 169. However, respondents submit that Rutgers is not free to force any student to support these organizations.

Galda II proscribes compelled contributions to independent, ideological groups as a precondition of enrollment at a state university. It does not impact upon PIRG's or any other independent group's access to the Rutgers' community, nor does it have any effect upon the content of a particular entity's political and ideological positions. Thus, Rutgers remains totally free "to determine for itself on academic ground who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Widmar v. Vincent*, 454 U.S. at 276, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result). Moreover, Rutgers' academic freedom—in terms of the content to which its students will be exposed—is respected and preserved by the decision in *Galda II*.

Petitioners confuse the academic freedom and first amendment principles set forth in *Widmar* and *Healy* with the constitutional limitations on a state university's authority to compel ideological contributions imposed by the circuit court in *Galda II*. Essentially, they contend that as long as Rutgers does not attempt to advance its

own ideology, it is free to require its students to support any number of independent, ideological organizations under the guise of advancing a public forum.

Neither *Widmar*, 454 U.S. 263, nor *Healy*, 408 U.S. 169, extended the concept of academic freedom this far. Indeed, taken to its logical extent, petitioners' argument suggests the proposition that Rutgers may compel funding for any organization, even a political party, as long as it permits that organization's ideological competitors equal access to the funding process. However, simply because Democrats and Republicans or PIRG's and "Anti-PIRG's" can avail themselves of a particular funding policy does not cure the underlying constitutional infringement. In a mandaory fee situation, students who oppose either or both organizations, or who would prefer not to contribute at all, are all compelled to support a particular ideology against their wishes. Neither *Widmar*, 454 U.S. 263, nor *Healy*, 408 U.S. 169, mandate this result, nor does any claim of academic freedom justify this abridgement of an individual's first amendment rights. Accordingly, *Galda II* is consistent with both *Widmar*, 454 U.S. 263, and *Healy*, 408 U.S. 163.

Similarly, any suggestion that the holding in *Galda II* infringes upon the first amendment rights of those students at Rutgers who support PIRG must be rejected. Any student at Rutgers remains free to voluntarily support PIRG at whatever level he or she chooses. All that has been denied are the "right" to be subjected to a mandatory fee and the convenience of making one's contribution via the university's billing system. Neither of these factors are rights guaranteed to anyone by the constitution, nor does the decision in *Galda II* extend beyond these limitations. Consequently, the first amendment freedoms established in *Widmar*, 454 U.S. 263, and *Healy*, 408 U.S. 169, remain unaffected by the true holding in *Galda II*.

IV. Having determined that the exaction of the PIRG fee by Rutgers was unconstitutional, the injunction ordered by the court below was proper.

Petitioners finally contend that even if the circuit court was correct in its decision on the merits, it was wrong in enjoining the collection of the PIRG fee. Rp 17-19; Pp 16-17. Although this assertion was never raised until PIRG's Petition for Rehearing, apparently Rutgers and PIRG now believe that the circuit court had some affirmative duty to fashion a legal plan for the funding of PIRG.

This implicit suggestion is troubling and should be rejected. The circuit court rendered a decision on the actual case before it. The adequacy of any of the alternatives proposed by the petitioners was not before the court—only the conduct itself was at issue. The court determined that the exaction of the PIRG fee by Rutgers was unconstitutional and enjoined any further collection. This was perfectly appropriate. Respondents are unaware of any theory of law which imposes an affirmative obligation on a court, which has ruled on the merits of a case, to advance what is essentially an advisory opinion as to how a losing party can bring its conduct into conformity with the constitution.

Moreover, petitioners' citation to *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 104 S. Ct. 1883 (1984) is inapposite. *Ellis* involved an examination of the constitutionality of certain union expenditures, paid for by a representation fee, which were alleged to be unrelated to the union's role as the collective bargaining agent. *Id.*[8] The underlying constitutional cause of action —that non-union employees could not be compelled to

8. Mandatory payment of that portion of the representation fee which is applicable to the union's role as a collective bargaining agent is constitutionally permissible, because it furthers the important national interest of labor peace. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

support union activities unrelated to collective bargaining—was never at issue. All parties agreed that non-union employees could not be so compelled.

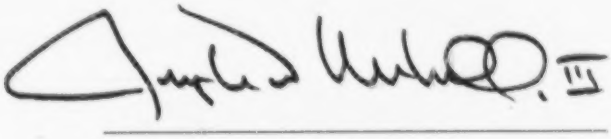
In addition, petitioners' reliance upon *Ellis*, 104 S. Ct. 1883, is also misplaced. The remedies discussed in *Ellis*, *Id.*, as well as in *Abood*, 431 U.S. 209, centered upon the union's legitimate right to a portion of the agency shop fee. Thus, an accommodation had to be reached between the funds a union could constitutionally compel and those it could not. In the instant matter, no such "split-fee" is involved. It follows, then, that if Rutgers cannot constitutionally collect any portion of the PIRG fee, there is no concomitant need or requirement for a reviewing court to establish any of the remedial measures proposed by the petitioners. As such, the entry of an injunction was proper.

Rutgers has been found to have been engaged in unconstitutional conduct with respect to its assessment of the PIRG fee. The circuit court made it clear that truly voluntary support of PIRG was permissible, but that compelled support was not. Should the University continue to desire to assist PIRG in generating financial contributions, the burden is properly upon Rutgers to devise a system which does not offend the first amendment rights of its students. If any new system is instituted, it will have to pass the test of voluntariness. This is nothing more than that required by the constitution.

CONCLUSION

For the reasons set forth above, the petitions for *writs* of *certiorari should be denied.*

Respectfully submitted,



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February 1986

CERTIFICATE OF SERVICE

I, Joseph W. Marshall, III, attorney for the Respondents, Joseph P. Galda, *et al.*, certify that on the 14th day of February, 1986, I caused to be served three (3) copies of the attached brief on the following:

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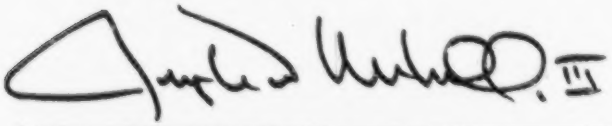

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